

**STATE OF NEW MEXICO
BEFORE THE SECRETARY OF ENVIRONMENT**

**NEW MEXICO ENVIRONMENT DEPARTMENT
HAZARDOUS WASTE BUREAU,
Complainant,**

v.

No. HWB 20-70 (CO)

**D. AND D. MOUNTAIN AIR CLEANERS, INC.,
Respondent.**

JOINT MOTION TO VACATE HEARING

In accordance with the New Mexico Environment Department Adjudicatory Procedures, 20.1.5.200(D) NMAC, the New Mexico Environment Department (“NMED”) and D&D Mountain Air Cleaners, Inc. (“D&D”) (collectively, the “Parties”) jointly move that the hearing currently scheduled for October 18, 2021, be vacated. In support of this motion and pursuant to 20.1.5.600(B) NMAC, the Parties have reached and executed a signed Settlement Agreement (Exhibit 1).

WHEREFORE, the Parties respectfully request that the Hearing Officer vacate the hearing set for October 18, 2021.

Jointly submitted this 24th day of September 2021,

NEW MEXICO ENVIRONMENT
DEPARTMENT

/s/ Christal Weatherly

Christal Weatherly

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HWB 20-70 (ACO) Joint Motion to Vacate Hearing

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Counsel for D&D Mountain Air Cleaners, Inc.

CERTIFICATE OF SERVICE

I hereby certify that the preceding **Joint Motion to Vacate Hearing** was mailed via electronic mail on this 24th day of September 2021, to the following:

Madai Corral
Hearing Clerk
New Mexico Environment Department
madai.corral@state.nm.us

Thomas M. Hnasko
thnasko@hinklelawfirm.com

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/s/ Christal Weatherly
Christal Weatherly, Assistant General Counsel
New Mexico Environment Department

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**D. AND D. MOUNTAIN AIR CLEANERS, INC.,
Respondent**

SETTLEMENT AGREEMENT

This Settlement Agreement (“Agreement”) is made by and between the Resource Protection Division (“Division”) of the New Mexico Environment Department (“Department”) and Respondent, D. and D. Mountain Air Cleaners, Inc., (“Respondent”) (collectively, the “Parties”). The Parties enter into this Agreement to resolve alleged violations of the New Mexico Hazardous Waste Act (“HWA”), NMSA 1978, Sections 74-4-1 to -14 (1980, as amended through 2019), and the New Mexico Hazardous Waste Management Regulations (“HWMR”), 20.4.1 NMAC, at Respondent’s place of business, located at 309 Paseo de Oñate, Española, New Mexico, as specified in the Administrative Compliance Order (“ACO”) issued to Respondent by the Department on November 19, 2020.

I. BACKGROUND

A. PARTIES

1. Pursuant to NMSA 1978, Section 9-7A-4, the Department is an executive agency within the government of the State of New Mexico.

2. Pursuant to NMSA 1978, Section 9-7A-6(B), the Cabinet Secretary of the Department (“Secretary”) has every power expressly enumerated in the laws, whether granted to Secretary, the Department, or any Division of the Department.

3. Pursuant to NMSA 1978, Section 74-1-7(A)(13), the Department is authorized to administer and enforce the HWA and HWMR, including assessing civil penalties for violations thereof.

4. The Division is an organizational unit of the Department that was created pursuant to the authority granted the Secretary of the Department under NMSA 1978, Section 9-7A-6(B)(3). The Hazardous Waste Bureau ("Bureau") is an organizational unit of the Division.

5. Respondent is a "person" as defined by NMSA 1978, Section 74-4-3(M).

6. Respondent is a New Mexico for-profit corporation doing business at 309 Paseo de Oñate, Española, New Mexico ("Facility").

7. Respondent is a small quantity generator of hazardous waste, as defined in 40 C.F.R. § 262.13.

8. Respondent has the Environmental Protection Agency ("EPA") identification number NMR000024885.

B. ALLEGED VIOLATIONS

9. On November 19, 2020, the Division issued an Administrative Compliance Order ("ACO") to the Respondent with a civil penalty of \$56,000.00.

10. The Division alleged the following violations in the ACO:

- a. Respondent's failure to ensure delivery of hazardous waste to an off-site treatment, storage or disposal facility is a violation of 20.4.1.300 NMAC, incorporating 40 C.F.R. § 262.14(a)(5) by reference.
- b. Respondent's failure to obtain a hazardous waste treatment, storage and disposal permit is a violation of 20.4.1.900 NMAC, incorporating 40 C.F.R. § 270.1(b) by reference.

- c. Respondent's failure to design, construct, maintain and operate the facility in order to minimize the potential for fire, explosion or unplanned sudden or non-sudden release of hazardous waste or hazardous waste constituents to air, soil or surface water that could threaten human health or the environment is a violation of 20.4.1.500 NMAC, incorporating 40 C.F.R. § 264.31 by reference.

11. On December 18, 2020, Respondent filed its Request for Hearing and Answer to the ACO, denying that it had violated any of the referenced rules.

12. On January 4, 2021, the Department issued a Notice of Docketing and the assignment of a hearing officer.

13. Respondent subsequently obtained additional purchase and disposal records for hazardous waste.

14. Based on the additional records, the Department agreed to reduce the civil penalty to \$28,000.

15. On September 8, 2021, Respondent filed a Motion for Summary Disposition, arguing that the Department did not have sufficient evidence to prove that Respondent committed the remaining violations and requesting that the hearing officer enter a recommendation that the ACO be dismissed with prejudice prior to a hearing on the merits.

16. Respondent asserts in the Motion for Summary Disposition that its purchase and disposal records of PCE-containing solvents demonstrate proper use and disposal for all hazardous waste used by Respondent during the period 2010-2015.

17. The Department does not agree to the assertions in Respondent's Motion for Summary Disposition.

II. COMPROMISE AND SETTLEMENT

A. GENERAL

18. Following good faith settlement negotiations to resolve this matter without further costly litigation, the Parties agree to a complete settlement of all the violations alleged in the ACO and have consented to the terms of this Agreement.

19. Respondent does not admit the factual allegations and violations alleged in the ACO.

20. Respondent admits to the jurisdictional allegations of the ACO and consents to the relief specified in this Agreement.

21. The parties agree to the conditions set forth below.

B. ACTIONS REQUIRED & DEADLINES

22. Respondent shall, within 30 days from the effective date of this Agreement, issue a letter outlining and confirming its commitment to comply with the abatement requirement issued under the Water Quality Act on February 25, 2021, and any subsequent groundwater remediation requirements, to the extent such requirements are applicable to Respondent, to the following:

- a. Governor Chavarria, Santa Clara Pueblo
- b. Xavier Martinez, City Manager, City of Española
- c. Rio Arriba County Commissioners
- d. Chris Catechis, Acting Resource Protection Division Director, New Mexico
Environment Department

23. The letter shall also acknowledge Respondent's reservation of defenses to the imposition of such requirements and that Respondent does not waive any such defenses or its right to seek entry into the Voluntary Remediation Program.

23. Respondent shall send the letter as an attachment via electronic mail to the recipients' official email addresses, with counsel for the Department copied.

24. NMED will withdraw the ACO within seven days from the effective date of this Agreement.

III. OTHER TERMS AND CONDITIONS

A. ENFORCEMENT

25. Except as provided in Paragraphs 27-28 (Covenants Not to Sue), the Department reserves all of the powers, authorities, rights, and remedies, whether administrative or judicial, civil or criminal, legal or equitable, to enforce the requirements of the HWA and the HWMR for any past, present or future violation not addressed in the ACO. In any such action, the Respondent reserves the right to assert any defenses that it may have.

B. COVENANTS NOT TO SUE

26. The Department covenants not to sue or take any administrative or civil action against the Respondent under the HWA and HWMR for any of the facts or violations alleged in the ACO. This Covenant not to sue extends to the Respondent and its respective officers, directors, agents, employees, successors, and assigns and does not extend to any other person. This Covenant does not extend to future violations of the same or different HWA or HWMR requirements or violations of this Agreement.

27. Respondent covenants not to sue the State of New Mexico for any claims deriving from the ACO.

C. BINDING EFFECT

28. This Order shall be binding upon the Department and its successor agencies and shall be binding upon the Respondent and its successors.

D. EFFECTIVE DATE

29. This Agreement shall become effective upon execution by the Respondent and the Secretary of the Environment Department or his delegate.

E. INTEGRATION

30. This Agreement merges all prior written and oral communications between the Parties concerning the subject matter of this Agreement and contains the entire agreement between the Parties.

F. MODIFICATION

31. This Agreement shall not be modified except by express written agreement of the Parties.

G. RESERVATION OF RIGHTS AND DEFENSES

32. This Agreement shall not be construed to prohibit or limit the Department in any way from requiring the Respondent to comply with any state or federal requirements applicable to the Facility.

33. This Agreement shall not be construed to prohibit or limit the Department in any way from seeking any relief authorized by the HWA or the HWMR for violations of any state or federal requirements that occur in the future.

34. This Agreement shall not be construed to prohibit or limit the Respondent in any way from raising any defenses to any action by the Department for violations of the HWA or the HWMR.

35. The Department reserves the right to inspect or investigate the Facility at reasonable times, pursuant to NMSA 1978, Section 74-4-4.3.

36. Except as expressly provided herein, both Parties reserve all other legal privileges and rights.

H. WAIVER OF STATE LIABILITY

37. The Respondent shall assume all costs and liabilities incurred in performing any obligation under this Agreement.

38. The Department, on its own behalf, and on behalf of the State of New Mexico, shall not assume any liability for the performance of any obligation under this Agreement.

I. DISCLOSURE TO SUCCESSORS-IN-INTEREST

39. Until such time as the Respondent complies with the terms and conditions of the Agreement or it is terminated by written agreement of the Parties, Respondent shall disclose this Agreement to any successor-in-interest to the facility and shall advise such successor-in-interest that the Agreement are binding on the successor-in-interest.

J. FORCE MAJEURE

40. The Respondent's obligation to comply with this Agreement shall be deferred only to the extent and only for the duration that the failure in compliance is caused by "force majeure." For purposes of this Agreement, "force majeure" is defined as an event or set of circumstances which are beyond Respondent's control and could not have been prevented by Respondent's reasonable action or due diligence. "Force majeure" shall not apply to any failure in compliance due to increased costs or Respondent's financial inability to carry out this Agreement. Respondent shall submit notification to the Department no later than 48 hours after the date when it first knows or should have known that a failure in compliance is reasonably foreseeable. Such written notice

shall include the nature, cause and anticipated length of the delay associated with the failure of compliance and all steps that Respondent has taken and will take to avoid or minimize the failure of compliance, with a schedule of implementation. Failure to provide this written notice within the required time period shall constitute a waiver of Respondent's right to invoke "force majeure" for the particular event at issue. If the Department agrees that the failure in compliance is attributable to "force majeure," it shall extend the time for compliance only to the extent and only for the duration necessary to accommodate the "force majeure."

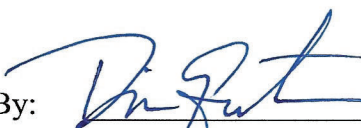
K. AUTHORITY OF SIGNATORIES

41. The persons executing this Agreement represent that they have the requisite authority to bind either the Department or the Respondent, as appropriate, to this Agreement, and that their representation shall be legally sufficient evidence of actual or apparent authority to bind the Department or the Respondent this Agreement.

FOR: NEW MEXICO ENVIRONMENT DEPARTMENT

By: Rebecca Roose Digitally signed by Rebecca Roose
Date: 2021.09.24 13:21:15 -06'00' Date: _____
Rebecca Roose
Deputy Cabinet Secretary of Administration
New Mexico Environment Department

FOR: D. AND D. MOUNTAIN AIR CLEANERS, INC.

By:  Date: 9/24/21
Print Name: DINA QUINTANA
Print Title: CEO